United States Department of Labor
Employees' Compensation Appeals Board

V.S., Appellant	)	
and	)	**Docket No. 09-1433**
	)	**Issued: April 7, 2010**
U.S. POSTAL SERVICE, D. SCHATZ STATION, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 16, 2008 that denied her recurrence claim and an April 7, 2009 decision that found that she had abandoned a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on or after June 2, 2008; and (2) whether she abandoned a telephonic hearing scheduled for March 19, 2009. On appeal appellant requested that her case be reviewed.

FACTUAL HISTORY

On May 24, 2004 appellant, then a 42-year-old letter carrier, filed a Form CA-2, occupational disease claim, alleging that her work duties caused derangement of the lateral meniscus and lumbago. She had stopped work on April 24, 2004. On June 25, 2004 Dr. Walter R. Sassard, Board-certified in orthopedic surgery, performed right knee arthroscopic surgery, and on August 10, 2004, the Office accepted that appellant sustained employment-related thoracic/lumbosacral radiculitis and a right knee medial meniscus tear. Appellant

received appropriate compensation, returned to modified duty on September 3, 2004 and thereafter claimed intermittent periods of disability.

Appellant continued modified duty until she stopped work on March 17, 2008, and filed a Form CA-7, claim for disability. On July 24, 2008 the employing establishment informed the Office that for the period June 21 to July 23, 2008 appellant received continuation of pay for eight hours a day under file number xxxxxx563, and had returned to work on July 24, 2008 for four hours a day and continued to receive continuation of pay for four hours a day through August 4, 2008. On July 10, 2008 appellant filed a Form CA-2a, recurrence of disability claim, alleging that on June 2, 2008 she sustained a recurrence due to frequent spasms and pain in the back and consequential left leg pain, stress and anxiety.[1] In "excuse from work" forms dated May 30 and June 6, 2008, Dr. Sassard noted that appellant was under his care for knee pain, a herniated lumbar disc, history of a lateral meniscus tear, lumbar radiculopathy, lumbago and swelling limb. He advised that she was incapacitated for work June 2 through 6, 2008 and after that could work four hours daily. A June 13, 2008 magnetic resonance imaging (MRI) scan of the right knee demonstrated a discoid lateral meniscus with a horizontal tear and degenerative changes in the medial meniscus with tearing of the articular surface, Grade 2 chondromalacia in the patellofemoral joint, joint effusion and tibial collateral ligament bursitis. In reports dated June 24, 2008, Dr. Earl Jay Clement, II, Board-certified in family medicine, advised that appellant should not work, stating that she was accosted by a patron who injured her neck, back and knee. He diagnosed lumbar sprain/strain, derangement of knee, generalized anxiety disorder and sprain of neck. In a July 8, 2008 duty status report, Dr. Sassard noted clinical findings of low back pain, left leg weakness, and right knee pain and noted that appellant was stressed. He advised that appellant could work four hours a day with restrictions to her physical activity.[2]

In an August 13, 2008 letter, the Office informed appellant of the evidence needed to support her recurrence claim, and in a response received on August 25, 2008, appellant stated that she was totally disabled for the period June 2 through 6, 2008 and partially disabled from June 6, 2008 and continuing. Appellant stated that her physical condition caused stress, anxiety and depression and that her right knee condition had worsened, noting that she had recently been attacked and was working half-days of modified duty and had a separate claim under file number xxxxxx563. She attached a modified assignment for four hours of daily work.[3] In a duty status report dated August 28, 2008, Dr. Sassard noted clinical findings of low back and right knee pain with stress and reiterated appellant's physical restrictions and his opinion that she could work four hours of modified duty daily. On September 15, 2008 the Office paid appellant intermittent compensation for the period July 5, 2007 to July 8, 2008. In a September 16, 2008 letter, the

[1] On July 29, 2008 appellant filed a schedule award claim. The record does not contain a final Office decision on the schedule award claim.

[2] The Board notes that the duty status report listed the physical requirements of appellant's regular work as a city carrier and not the modified duties she was performing. Dr. Sassard advised that she could lift and carry 15 to 25 pounds 2 to 4 hours daily, sit for 2 hours, stand for 2 hours, walk for 2 hours, climb for 1 hour, knee and twist for 0 to 1 hour, pull and push 60 pounds for 2 to 4 hours, grasp for 6 to 8 hours, finely manipulate for 1 hour, reach above the shoulder for 0 to 2 hours and drive for 2 hours with no bending or stooping.

[3] The job duties were working at caller door, lobby director, writing accountable items, and delivering express mail and pick up hub mail and deliver it with lifting restricted to 15 pounds intermittently, sitting and standing to 1 to 2 hours daily, and walking to 1 to 3 hours daily.

Office informed appellant of the specific dates of claimed disability covered, stating that she was paid for pain management, the MRI scan and physical therapy.[4]

By decision dated September 16, 2008, the Office denied appellant's recurrence claim on the grounds that the medical evidence was insufficient to establish that the work-related condition had worsened to the point that she sustained a recurrence of disability. On October 14, 2008 appellant requested a hearing. In a November 3, 2008 letter, the Office informed her of hearing procedures and responsibilities, specifically advising her of the procedures regarding a requested postponement. By letter dated February 19, 2009, sent to appellant's address of record, the Office informed her that a telephonic hearing was scheduled at 2:30 p.m. eastern time on March 19, 2009. Appellant was provided a toll-free telephone number and a passcode and was again informed of the procedures regarding postponement. In a decision dated April 7, 2009, the Office found that she had abandoned her request for a hearing because she failed to appear at the hearing scheduled on March 19, 2009.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[6]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[7]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on June 2, 2008 due to her accepted thoracic/lumbosacral radiculitis and right knee medial meniscus tear. Appellant did not establish that the nature and extent of the injury-related conditions changed on June 2, 2008 so as to prevent her from continuing to perform her modified-duty assignment. The Board has held that a partially

[4] This included four hours on June 13 and 16, 2008 and two hours on July 2, 2008.

[5] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[6] *Id.*

[7] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed.[8] The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.[9] A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[10]

In his May 30 and June 6, 2008 reports, Dr. Sassard advised that appellant should not work from June 2 through 6, 2008 but provided no further explanation. Dr. Clement advised on June 24, 2008 that appellant should not work and reported that she had been injured by a patron at work. In a duty status report dated July 7, 2008, Dr. Sassard advised that appellant could work four hours of modified duty daily.

The employing establishment reported that under a separate claim appellant received continuation of pay for eight hours a day from June 21 to July 23, 2008 and four hours daily from July 24, 2008 when she returned to work, to August 4, 2008. As appellant was receiving compensation in the form of continuation of pay for this period, she would not be entitled to concurrent disability compensation.[11]

As to any disability after August 4, 2008, while Dr. Sassard provided an August 28, 2008 report in which he noted clinical findings of low back pain and right knee pain and advised that appellant could work four hours of modified duty daily, the physician did not demonstrate knowledge of the specific job requirements of appellant's modified position or provide a rationalized explanation as to why the accepted conditions in this case, thoracic/lumbosacral radiculitis and right knee medial meniscus tear that had been surgically repaired, disabled appellant from performing her modified duties for an additional four hours daily.[12]

The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.[13] It is appellant's burden of proof to submit the necessary medical evidence to establish a claim for a recurrence. A mere conclusion without the necessary medical rationale explaining how and why the physician believes that a claimant's accepted exposure would result in a diagnosed condition is not sufficient to meet the claimant's burden of proof. The medical evidence must also include rationale explaining how the physician reached the conclusion he or she is supporting.[14] The

[8] *See William M. Bailey*, 51 ECAB 197 (1999).

[9] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[10] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[11] *D.D.*, 58 ECAB 206 (2006).

[12] *Supra* note 2.

[13] *See Albert C. Brown*, 52 ECAB 152 (2000).

[14] *Beverly A. Spencer*, 55 ECAB 501 (2004).

record in this case does not contain a medical report providing a reasoned medical opinion that appellant's claimed recurrence of disability was caused by the accepted conditions.[15]

LEGAL PRECEDENT -- ISSUE 2

The Office's regulations address the requirements for obtaining a hearing and provide that a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.[16] Scheduling is at the sole discretion of the hearing representative, and is not reviewable.[17] The legal authority governing abandonment of hearings rests with the procedure manual of the Office which provides that a hearing can be considered abandoned only under very limited circumstances.[18] The following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Office will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.[19]

ANALYSIS -- ISSUE 2

On October 14, 2008 appellant requested a hearing. By letter dated November 3, 2008, the Office informed her of the hearing procedures, and on February 19, 2009 mailed her a notice that a telephone hearing was scheduled at 2:30 p.m. eastern time on March 19, 2009 and provided instructions for contacting the Office.

While on appeal appellant stated that she had moved to Huffman, she also listed an address of record of P.O. Box 4201421, Houston, Texas, the address to which the Office mailed the February 19, 2009 notice that a hearing was scheduled on March 19, 2009. In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[20]

The Board thus finds that the February 19, 2009 Office communication put appellant on notice that a telephone hearing had been scheduled. Appellant did not communicate with the Office either before or within 10 days after the scheduled hearing to request a postponement or explain why she did not telephone the Office for the scheduled hearing. The record thus supports that appellant did not request a postponement of the March 19, 2009 hearing, that she failed to appear by not participating in the scheduled telephonic hearing, and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the

[15] *Cecelia M. Corley*, *supra* note 9.

[16] 20 C.F.R. §§ 10.615, 10.616.

[17] *Id.* at § 10.622(b).

[18] *Claudia J. Whitten*, 52 ECAB 483 (2001).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *D.F.*, 58 ECAB 178 (2006).

[20] *C.T.*, 60 ECAB ___ (Docket No. 08-2160, issued May 7, 2009).

conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.[21]

CONCLUSION

The Board finds that appellant did not establish that she sustained a recurrence of disability on or after June 2, 2008 and that she did abandon a telephonic hearing scheduled for March 19, 2009.[22]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7, 2009 and September 16, 2008 be affirmed.

Issued: April 7, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[21] *Claudia J. Whitten, supra* note 18.

[22] It is noted that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).